IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Judge Gaughan
	)	Cleveland, Ohio
vs.	)	
	)	
JESUS ERNESTO GONZALEZ,	)	Number 1:11CR580
	)	
Defendant.	)	

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TRANSCRIPT OF PROCEEDINGS HAD BEFORE

THE HONORABLE PATRICIA ANNE GAUGHAN

JUDGE OF SAID COURT,

ON MONDAY, APRIL 30, 2012

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APPEARANCES:

For the Government: EDWARD E. FERAN,
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For the Defendant: JAMES J. MCDONNELL, ESQ.,
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Official Court Reporter: Shirle M. Perkins, RDR, CRR
U.S. District Court
801 West Superior, #7-189
Cleveland, OH 44113-1829
(216) 357-7106

11:31:02 Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

MONDAY SESSION, APRIL 30, 2012, AT 11:31 A.M.

THE COURT: Mr. Gonzalez. Mr. Gonzalez, you may approach the podium with counsel.

We're here in the matter of Jesus, United States of America versus Jesus Ernesto Gonzalez, Case Number 11CR580.

Present in court is Mr. Gonzalez; is that correct, sir?

THE DEFENDANT: Yes.

THE COURT: Represented by his attorney, Mr. Jim McDonnell. On behalf of the Government, Mr. Ed Feran. On behalf of probation, Mr. Rod Capuano.

Sir, on January 31st, you entered a plea of guilty to Count 1 of the indictment. At that time, I referred your matter to the Probation Department for a presentence investigation.

I have that report before me. I certainly have reviewed it in depth. Have you had an opportunity to go over this report with Mr. McDonnell?

THE DEFENDANT: Yes.

THE COURT: According to this report, sir, your Base Offense Level is 28, in that you possessed with the intent to distribute 537.9 grams of heroin. There are no specific offense characteristics, no victim-related adjustments, no adjustments for role in the offense, no adjustment for obstruction of justice. Three levels are deducted for acceptance of responsibility. No Chapter 4 enhancements, for a total offense level of 25. You have four criminal history points, which correspond to a Criminal History Category of 3.

11:33:16 Mr. McDonnell, on behalf of your client, the Court notes you do have an objection to Paragraph 64 of the report. Paragraph 64 indicates that it's the Probation Officer's position that the total offense level is a 28 prior to any 5K1 motion. Is that correct?

11:33:46 MR. McDONNELL: Yes, your Honor.

THE COURT: Mr. Capuano, I'm a bit confused, however, because when I look on Page 6, you do have the total offense level to be a 25. So it appears as if Paragraph 64 contradicts Paragraph 30.

11:34:08 PROBATION OFFICER: Yes, your Honor. Paragraph 64, the reason it's indicated that the total offense level would be a 28 is because the first offense level, which contains a 120-month sentence, because of the mandatory minimum, ten-year sentence, under Mr. Gonzalez's 11:34:29 criminal history category, which would be a 3, is a total offense level of 28. And that's where the offense level raises up to 28, your Honor.

THE COURT: All right.

So I mean many times, I see that incorporated in the 11:34:40 table, the offense level computation, but what you're saying is that yes, the total offense level is a 25 and then bumps up to a 28 because of the 120-month mandatory minimum?

PROBATION OFFICER: Yes, your Honor.

THE COURT: So you just didn't put Paragraph 64 in the computation table; is that right?

11:34:58

PROBATION OFFICER: Correct, your Honor.

THE COURT: All right.

But, it is your position that the total offense level, prior to any Government motion, is a 28?

11:35:14

PROBATION OFFICER: That is correct, your Honor.

THE COURT: Okay. Mr. McDonnell. This is an ongoing issue, as you well know.

MR. McDONNELL: Right.

11:35:29

THE COURT: And I, in fact, have read an opinion that honestly goes against the Defendant, and it's a well written opinion by Judge Adams on this matter. It's also my understanding that the Government is responding to this issue by now saying if a Court is going to adopt the Probation Officer's position, Probation Department's position, that your substantial assistance is going to include the three levels for acceptance of responsibility.

11:35:57

Is that a fair statement?

MR. FERAN: That would be correct, your Honor. That's the Court's position.

11:36:12

THE COURT: So in the event I find that the total offense level is a 28, you are going to then move for a five-level substantial assistance departure, as opposed to a two-level?

11:36:27 MR. FERAN: That would be correct, your Honor.

THE COURT: Do you wish to be heard on this at all?

MR. FERAN: I could, if I could for a minute, your Honor.

11:36:33 THE COURT: Sure.

MR. FERAN: Thanks, Judge.

The U.S. Attorney's Office and the Probation Office have a respectful disagreement on the interpretation of the Guidelines and how they work in this case. I would submit 11:36:42 to the Court the following:

When Mr. McDonnell and I were contemplating this plea agreement, as the Court is well aware, the plea agreement is a contract that both sides enter into and only recommending to the Court. And we realized that, however, when we 11:36:54 drafted the plea agreement and I had conversations with Mr. McDonnell, we did a Guideline calculation between ourselves, which is consistent with Paragraph Number 63 of this presentence report, that being that we would start out at a 28, three levels for acceptance of responsibility, and 11:37:10 would move the Court for two levels, for a final adjusted

offense level of 23, Criminal History Category 3, with a 57-to-71-month term. And that was my understanding, and I believe that was Mr. McDonnell's understanding of the Guideline range that this Defendant would fall in, based on
11:37:26 his criminal conduct and acceptance of responsibility and his substantial assistance.

So that's where we were coming from, Judge, as we drafted this plea agreement, and that's how I approached this case and this plea and the sentence.

11:37:45 THE COURT: Mr. Capuano, do you wish to be heard at all?

PROBATION OFFICER: No, your Honor.

THE COURT: Mr. McDonnell?

MR. McDONNELL: I couldn't have said it any
11:37:52 better than Mr. Feran. That was our agreement.

THE COURT: I so wish this dispute could be resolved.

MR. FERAN: As do I, your Honor.

THE COURT: I know. But, what I will do is I
11:38:05 will go ahead and determine that the total offense level is a 25, but I am going to indicate, Mr. Capuano, that I do so only in order to honor the plea agreement. All right? Because I do think the Probation Department has some well-thought out arguments as to why it technically should
11:38:26 be then bumped up to a 28, but I will honor the plea

agreement even though I'm aware I don't have to.

So now that we are at a 25 -- so your objection is well taken is what I'm indicating, Mr. McDonnell.

MR. McDONNELL: Thank you, your Honor.

11:38:41 THE COURT: Now, that we are at a 25 and a 3, any other objections, Mr. McDonnell?

MR. McDONNELL: At this point, no, your Honor.

THE COURT: And, Mr. Feran, do you have any objections to the report?

11:38:50 MR. FERAN: No, your Honor.

THE COURT: All right.

Mr. Feran, now I'm going to call on you. Do you have a motion?

MR. FERAN: Yes, Judge.

11:38:57 Judge, pursuant to the United States Sentencing Guideline Section 5K1.1, the Government would move this Court to credit Mr. Gonzalez with a two-level reduction for substantial assistance to the Government.

Judge, the Defendant participated in a proffer session 11:39:15 on November 17th of 2010, which he conveyed information.

THE COURT: 2010 did you say?

MR. FERAN: 2011. Thank you, Judge. 2011, which the Government found to be valuable and helpful, and for that, we're crediting him for a two-level reduction. 11:39:30 Thank you.

THE COURT: I will, in fact, grant the two-level downward departure for substantial assistance. We are not at a 23 and a 3. That puts us in an advisory Sentencing Guideline range of 57 to 71 months.

11:39:44 On the issue of sentencing, Mr. McDonnell, should I call on you first or your client?

MR. McDONNELL: I'll go first.

THE COURT: Go right ahead.

MR. McDONNELL: Your Honor, may it please the 11:39:50 Court.

First of all, I'm in agreement with the Base Offense Level and the sentence that we reached between 57 and 71 months. I respectfully request that you sentence him to the low end for a couple of reasons.

11:40:06 One, Paragraph 78 talks about warranting a variance. I didn't want to bring that up because it's not appropriate, but it talks about his lack of a male role model as a youth and substance abuse issue. I think those would be two issues you could sentence him to 57 months. Review of the 11:40:26 presentence report shows that he does have a drug problem. He would benefit from treatment. He hasn't really decided where he would like to ask me to go, but the recommendation.

In this case, he clearly was wrong, but he also clearly was used, and I think the reason he was used is he 11:40:43 just feels, to me, like some sort of naive kid. He does not -- he certainly is a criminal, based upon his actions, but he just seems like a soft kid, made two horrible mistakes in his life. And for those reasons, I respectfully request a sentence of 57 months.

11:41:03 THE COURT: Mr. Gonzalez.

THE DEFENDANT: Well, I agree with Mr. McDonnell. I know what I did, and I was wrong. I regret it, and I have regretted it. I did because I'm -- well, they said it was going to be easy and everything, and 11:41:22 I really wasn't thinking about the consequences. Now I have to face them. And I don't know what else to say.

THE COURT: Sir, did you really swallow --

THE DEFENDANT: Yes, ma'am.

THE COURT: -- all this heroin?

11:41:35 THE DEFENDANT: Yes.

MR. McDONNELL: He almost died in the hospital.

THE COURT: How -- how -- why are you alive? You swallowed it all with the intent of defecating and 11:41:49 getting it out of your system that way for these other people?

THE DEFENDANT: Yes.

THE COURT: They could turn around and sell it to heroin addicts basically?

11:41:59 THE DEFENDANT: Yes.

THE COURT: Wow.

You know, sir, I -- heroin's becoming an epidemic in this country, and I have major problems with people like you that are putting it out in society. And these young kids are getting addicted to it, and it's probably the hardest drug to beat in terms of the addiction. And I'm angry about it. I'm telling you right now I'm angry about it.

And explain to me how you could have a possession with intent to distribute heroin only a year and four months after your conviction for possession of marijuana for sale. Explain that to me. Explain how you couldn't have learned your lesson the first time around.

THE DEFENDANT: Well, I got my girl pregnant, and I needed the money and everything. I couldn't get a job. I didn't finish my school. And these people came to me and said that they were going to give me money if I did that, and then that some other people that didn't get hurt or anything.

So I really didn't think about it. I thought I was going to be able to do it and everything went wrong.

THE COURT: How much money?

THE DEFENDANT: A thousand dollars.

THE COURT: How old are you, sir?

THE DEFENDANT: Just turned 20.

THE COURT: You turned 20 in March, right?

THE DEFENDANT: Yes.

THE COURT: Mr. Feran.

MR. FERAN: Your Honor, we would respectfully ask the Court to adopt what's contained in the Guideline range. It is 57 to 71 months. I would ask the Court to sentence him within that range.

I would just say this for the record. As the Court stated, Mr. McDonnell stated, he's lucky to be here. He swallowed 45 individual packets of heroin.

THE COURT: Oh, my gosh.

MR. FERAN: Spent the next several days defecating these packages out. One of the packets when he passed it was already corroded. So I mean he came within an eye lash of dying at the hospital, or on the plane, at the airport, wherever he could have been. It's a miracle he's here.

He had about over half a kilo of almost very high purity Mexican heroin within his body cavity. The street heroin is approximately 45-plus thousand dollars, originating from Taiwan, coming into the United States. I say this because he's just lucky to be here, quite frankly. A miracle he's not dead. So any sentence he gets and I -- I've not -- I have no problem with the Guideline range here at all. I have no problem with that. He would have been looking at ten years if he decided not to do what was in his best interest. So he -- he did the right thing, and he was cooperative to law enforcement, I would say that, with hospital staff, cooperative with the US Attorney's Office.

So once he did finally get caught, he -- and through his counsel did everything correctly from that point on. He's just a very lucky 20-year-old individual that he's, Number 1, here today. And I can't believe he's lucky he's going to jail instead of the cemetery, quite frankly.

Thank you.

11:45:26 THE COURT: Mr. Capuano.

PROBATION OFFICER: We have nothing, your Honor.

THE COURT: Anything else, Mr. McDonnell?

MR. McDONNELL: No, your Honor.

11:45:31 THE COURT: It's the judgment of this Court, sir, you be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 57 months.

Upon release from imprisonment, you will be placed on supervised release for three years. Within 72 hours of 11:45:56 release from the -- one moment. You know what? I'm going to change that.

Sir, I really have agonized over whether 57 months is enough time. But I -- but, I said it, and I'm going to stick with it. However, what I'm going to do is put you on 11:46:28 five years supervised release, which means you are with me for five years after you get out of prison. And I'm going to make sure you stay on the straight and narrow. Okay? You've got to get out of this drug business, and being with me for five years, you will get out of it. Okay?

Within 72 hours of release from the custody of the Bureau of Prisons, you must report in person to the Probation Office in the district to which you are released. I'm not going to order a fine. However, there is a $100 special assessment due and payable on the date of sentencing. While on supervision, you must comply with all of the standard conditions adopted by this Court and your Probation Officer will go over every one of those with you.

In addition, you're going to be drug tested within 15 days of commencement of supervision. And you must submit to at least two periodic drug tests thereafter. You will not possess a firearm, destructive device, or any dangerous weapon.

You must submit to a warrantless search based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. You must participate in drug treatment as deemed appropriate by your Probation Officer. And, sir, please listen carefully to me. I'm going to order that you get your GED. Your Probation Officer will help you with that. You need to get your education. And you must cooperate in the collection of DNA.

Let me inform you that you do have the right to appeal your conviction and sentence, to the extent that you have not waived any appellate right. If you cannot afford to appeal, the cost will be borne by the Government. I do, in fact, find the sentence to be sufficient but not greater than necessary to satisfy the purposes of sentencing. This is a sentence within the Advisory Guideline range. I have, in fact, taken into account the two factors noted by Mr. McDonnell in support of a variance. I'm not giving a downward variance, but I am taking those factors into account and sentencing you at the lowest end of the range.

But, I will tell you, sir, that if you mess up at all while you're on supervised release with me, you have my word you will go back to prison. And it won't be for the minimum. You understand that?

THE DEFENDANT: Yes.

THE COURT: All right.

Mr. McDonnell, is there anything further, sir?

MR. McDONNELL: No, your Honor.

THE COURT: Mr. Feran?

MR. FERAN: Nothing further, Judge. Thank you.

THE COURT: Mr. Capuano.

PROBATION OFFICER: Nothing, your Honor. Thank you.

THE COURT: Good luck to you, sir.

(Proceedings adjourned at 11:48 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Shirle Perkins

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